FOURTH SESSION

Friday, April 28, 1916, 8 o'clock p.m.

The Society reconvened at 8 o'clock p.m., Mr. JAMES BROWN SCOTT, presiding.

The CHAIRMAN. Ladies and gentlemen: In the absence of the President of the Society it is my privilege to act as chairman of the meeting this evening.

The subject for discussion is one of great interest and importance, namely, Should the right to establish war zones on the high seas be recognized, and what, if any, should be the provisions of international law on this subject?

The speakers of the evening are Amos S. Hershey, Professor of Political Science and International Law in the University of Indiana, and Francis N. Thorpe, Professor of Political Science and Constitutional Law in the University of Pittsburgh.

At the end of the papers there will be an informal discussion by the members present. The order will be slightly changed because of the absence of Professor Thorpe, whose paper I shall have the pleasure myself of reading, after which Professor Hershey will be good enough to deliver his own paper in person, and then the topic will be thrown open to discussion.

SHOULD THE RIGHT TO ESTABLISH WAR ZONES ON THE HIGH SEAS BE RECOGNIZED, AND WHAT, IF ANY, SHOULD BE THE PROVISIONS OF INTERNATIONAL LAW ON THIS SUBJECT?

ADDRESS OF FRANCIS NEWTON THORPE*

Professor of Political Science and Constitutional Law in the University of Pittsburgh

By international law is understood the rules which determine the conduct of the general body of civilized states in their mutual dealings.

*Read in the absence of Professor Thorpe by Mr. James Brown Scott.

By the high seas is understood, in admiralty proceedings, the waters of the ocean from shore to shore at low water mark; in international law the high seas means only so much of the ocean as is exterior to a line running parallel with the shore and at some distance therefrom, commonly such distance as can be defended by artillery upon the shore, and therefore a cannon shot or a marine league, that is, three nautical, or four statute miles. By a war zone is understood a naval zone of active operations interdicted to neutrals and non-combatants, a closing of waters unquestionably part of the high seas, to secure the effects of a blockade. By a right, as that word is applied in international law, is understood a function or office of sovereignty as applied to a nation.

The question now under examination therefore must be understood to ask whether international law recognizes, or should or should not recognize, the establishing of a war zone as a truly sovereign act. Though the question is new and grows out of a conception brought into prominence by the present European War, it is only one of many questions, each more or less novel at the time of its formulation, incident to the prevailing conception of national sovereignty. This is to say, given the prevailing concept of national sovereignty, should international law recognize the right of a nation to establish war zones? Or, should the concept of national sovereignty be so modified as to eliminate the possibility of the establishing of such zones?

The immediate case is that of the British and German war zones existing, according to the declaration of Germany, and comprising the northern and western coasts of France, as well as all the waters surrounding the British Isles. Within this area, so Germany has proclaimed, all enemy vessels found by Germany will be destroyed, and neutral vessels will be in danger. This declaration is a claim by Germany of right to torpedo at sight, without regard to the safety of crew or passengers, any merchant vessel, under any flag, found within the zone.

In execution of this claim, Germany, though unable to maintain any vessel on the surface of the waters of this zone, carries on attacks by submarines. These are unable to comply with the obligations hitherto accepted as binding in war, that is, to discriminate between neutral and enemy ships, or cargo; duly to examine and verify the status of the captured vessel and to become responsible for the safety of its papers; not to sink the captured vessel, save under extraordinary

circumstances, and never then save after adequate measures have been taken to save the crew and the passengers; to take the captured vessel before a prize court which shall determine all questions involved, and to observe all duties of humanity. The German submarine complies with none of these so-called obligations of international law. It destroys life and property without regard to rule, obligation, agreement, or observance of practice hitherto observed by civilized peoples. Germany defends its procedure as fully warranted in order to effect a blockade of Great Britain and France, to cut off these nations from supplies from neutrals, or from other sources. It is defended as an exercise of the sovereign right of Germany to self-defense.

Great Britain and France, claiming the rightful exercise of the like sovereignty, consider themselves free to stop and to conduct into their ports vessels from any port supposed to be carrying merchandise or supplies destined for Germany, whether such merchandise or vessels be the property of the enemy, or of a neutral, whether such vessels be going to or coming from said enemy.

The appeal to rights of sovereignty is made alike by each belligerent: the right to self-defense. Neutral commerce on the high seas thus becomes subject to seizure and to possible confiscation in British or French prize courts; it becomes subject to destruction, together with the lives of the persons immediately in charge of it, by German submarines. The rights,—also sovereign rights,—of neutrals on the high seas are thus ignored by the belligerents,—the Central Powers, on the one side; the Allies on the other. Thus this interdiction of a portion of the high seas as a war zone involves quite the entire subject of international law, as hitherto understood: blockade, neutrality, commercial rights, the high seas, and, fundamentally, the conception of sovereignty as applied in our day to nations.

In November, 1914, and February, 1915, there was founded, at Berne, Switzerland, an *Association pour la Sauvegarde du Droit des Gens*. The purpose of this association is declared to be "to institute an impartial inquiry into cases of the violation of international law." "The only sanction left for enforcing respect for violated law," so this association declares, "resides in the reprobation of public opinion everywhere." "The opinion of the civilized world," it continues, "must be able to restrain within just limits the forces or passions let loose by war." "A great gulf is opening between the peoples of the earth." The appeal is "to the best minds in neutral lands." The

grand purpose, it is declared, is "to further the interests of *Truth,* the triumph of *Law,—pro luce et jure*—to combat error, a fruitful cause of division and hatred between nations, and by this means to contribute to the reconciliation of the best minds everywhere."

This *appeal* by one of the neutral nations, a nation whose sovereignty is guaranteed, as was that of Belgium, is in sharp contrast to events and facts growing out of the *command* of another nation, a sovereign, with respect to the invasion of Belgium. The appeal is to public opinion of the civilized world. The intimation is that such an opinion exists and that it is capable of regulating international affairs, of enforcing respect for violated law; indeed, of giving form, content, meaning to that law. The presupposition here is of the existence of a body of international law. It is, as it were, an appeal to return to first principles, to "the faith of the fathers." On the other hand, in these troublous times, some venturesome minds, doubtless clouded by the troubles of the day, have doubted whether the fathers had aught of faith; whether international law ever existed; whether *pro luce et jure* can be realized by enforcing respect of what has been called "international law"; whether creation is not demanded rather than restoration; whether old conceptions of national sovereignty must not be abandoned; whether the entire world must not have "a new birth of freedom" in the *interests of truth and the triumph of law.*

The question under examination involves many particular questions, which to state is to answer them. Suppose this question were to be approached in the Socratic, or the Franklinean manner.

Are the high seas the common highway of nations?

Can a state of war between or among nations, or any of them, change the character of the high seas?

Can a state of war give or establish title in a belligerent, or belligerents, to the high seas or any part of them?

Are the high seas the common property of all mankind only in time of peace among nations?

Is the true character of the right, title, use, or easement of the high seas determinable only in time of war?

Do belligerents (or does any belligerent) alone have the right to determine, limit, bound, prescribe, fix, establish, maintain title to, ownership or use of the high seas?

In such time (of war) does a neutral (or do neutrals) cease to have any such title, right or use, to, in or of the high seas?

Are neutrals (is a neutral) dependent on belligerents (or any belligerent) for such right, title or use?

Then do the high seas belong to belligerents (or to any belligerent) only?

Are neutrals (is any neutral) the user of the high seas only at the will (by the sufferance) of belligerents (any belligerent), and not by original right, that is, right of sovereignty?

Do the high seas belong only to the Power (nation, or sovereignty) which can, for the time being, dominate them?

Are neutrals (is any neutral) both *de jure* and *de facto non pares inter pares* unless they (or either of them) cease being neutrals and become belligerents, and not belligerents only, but belligerents dominating or controlling the high seas?

Have neutrals (or any neutral) rights on the high seas which belligerents (or any belligerent) are bound to respect?

Is the right to use the high seas, at any time anything more than a privilege granted, *de facto,* by the most powerful belligerent?

If any national at any time has not a right to but only a privilege in the use of the high seas, what becomes of the fundamental doctrine of international law: the doctrine of *pares inter pares*?

If every national uses the high seas as a means of realizing its sovereignty how can that doctrine be maintained?

Therefore, starting with the doctrine of *pares inter pares* and its applications under international law as hitherto expounded, is not the establishing of war zones on the high seas a fundamental right of any nation or nations, the sole deterrent, on final analysis, being a matter of expediency?

In other words, if we start with the doctrine of national sovereignty, is not recognition, by international law, of the right to establish war zones on the high seas implied?

But other questions demand utterance:

How can belligerents (for the creator of a war zone is *de facto* a belligerent under the rules) maintain exclusive title, right or use, to or of the high seas?

(1) By actual patrol of said seas (technical, physical possession of them).

(2) By blockade (that is, an effective blockade).

(3) By declaring a designated marine area such a zone, as by a Berlin Decree or an Order in Council. Such a declaration places all

neutral vessels in danger, and by so much succeeds in establishing the war zone.

As to the location of a war zone:

Shall it be located at the will of the belligerent? For example, if Germany can declare British and French coasts a war zone, may that zone not be extended indefinitely so as to include any portion of the high seas over which merchandise may be conveyed from any source, thus operating up to the marine league limit of any nation, along its own coast? May not such a war zone be declared to include the Gulf of Mexico, or the immediate Atlantic or Pacific waters of the United States? As a matter of right the entire area of the high seas may be declared to lie within a war zone as any particular area. Thus a German submarine might destroy an American merchantman just leaving New York waters as well as an American merchantman just entering the North Sea.

But the belligerent defends his policy of declaring a war zone by appealing to the fundamental right of self-protection: the maintenance of national existence, the continuance of national sovereignty. And this is the great appeal with every nation. All other obligations yield to this one. "Skin upon skin, yea all that a man hath will he give for his life," translated into terms of international law may read, "All acts necessary for self-existence may and must be done." This is the fundamental of the doctrine *pares inter pares.*

This doctrine, as traditionally expounded and applied, includes the doctrine of neutrality. In this connection there are other questions, not a few, as for example:

Is the doctrine of neutral rights compatible with that of establishing war zones?

Does the sovereign right of a belligerent outweigh the sovereign right of a neutral?

Does the existence of a state of war eliminate, in any degree, the sovereign rights of neutrals?

Evidently the essential right of the national sovereignty, its right to existence, to continuity as a nation, as this right is interpreted and applied by itself alone, or with allied Powers, or by consent of the nations, must be examined in order to understand the right, if such exists, in any nation to establish a war zone.

The fundamental of national right is the right of self-defense; of perpetuity; of remaining a sovereign. Thus by the exercise of this

right a nation acquires territory by conquest, purchase, treaty, exploration, accretion, or in any way whatsoever by which it can acquire it; and, conversely, by the same right it can dispose of territory. By this right it regulates its domestic affairs, and also acquires such aids and advantages, from other nations, as are within its power, by war, by treaty, by compliance, or whatsoever form of agreement it may accede to. A nation is the sole judge of the necessities of its own existence. It is responsible to itself and its own people, or to such person or persons as may on final test, determine the course of its affairs. To this end forms of government exist, whether democratic, representative, monarchical, or other; and the body of law by which its domestic affairs is regulated, a body of law more or less organic, is denominated constitutional law. The marks of sovereignty distinguishing the nation are well known to text-book writers, to statesmen, and, generally speaking, to citizens or subjects of the nation.

But there are many nations, some physically weak, others powerful. However, sovereignty is not determined, according to the definition found in the books and in practice at all times, by this theoretical equality. Equality is held to be a fundamental in testing sovereignty, *pares inter pares.* This conception is declared to be a working principle in world-government. Because it has worked with less violence to a conception of sovereignty founded on abstract right than to a conception of sovereignty founded on actual might, it has been accepted, and is today accepted as the true basis of international law. The practical difficulty in the administration of the theory is the administration of the theory: to hold the scales evenly when Germany is in the one and Belgium is in the other: to ignore material and physical discrepancies and to recognize the ethics of the case, as it may be rudely stated, that the all of a small nation, is as to sovereignty, equivalent to the all of a great nation. In other words, the concept of interstate relations, *pares inter pares,* and the concept of individual relations, all men are created equal, are essentially the same.

But difficulties at once spring up. The nation does by the individual as the nation is not done by. The nation prescribes for its individual citizen or subject or group of subjects or citizens many limitations, as for instance, limitation of industrial activity, a course of compulsory activity, a denial of any activity. It limits citizen or subject for its own ends, as it wills. It proceeds on the theory that such limitation conduces to the general welfare, that is, when the idea is stripped to its

real meaning, the state proceeds to do, as to its citizens or subjects, all those things which, in the opinion of the supreme power in the state, enable it to remain the state. Thus the state limits private fortunes, prescribes military and naval duties, regulates trade and commerce, deflects industrial activity to particular channels, dictates education, establishes religion; in short, controls the lives and fortunes of its people. This control may be exercised under some general plan of government, as a constitution, written or unwritten; or it may be exercised at the will of an absolute monarch. Whether exercised as in a democracy or as under absolutism, it is the exercise of sovereignty, and by the doctrine *pares inter pares*. And no political corollary is more widely accepted than that each nation as to its own domestic affairs is a law unto itself.

But the nation, the unit in sovereignty, is but one of many units in sovereignty. The fundamental conception of sovereignty is to continue sovereign; as the fundamental conception of life is to live. Whether there was ever a time when the individual citizen or subject was unlimited by the state in which he lived we do not know: it may be said that we can not conceive of the state as existing if such limitation was absent. The essential characteristic of the state is limitation of the individual subject or citizen, a limitation having a dual nature, for his own benefit, and for the benefit of the state. Government is limitation. A nation is a nation because it succeeds in maintaining limitations on the citizens or subjects within its borders. Thus it may be declared to be an axiom: no limitation, no state.

Civilization is limitation. The phrase "the perfect law of liberty" is not paradoxical. The price of civilization is limitation. But the process by which the state, or nation prescribes limits, however notably its own, is tested by processes prescribed by other nations for like ends, and its results are judged according to the prevailing ideals at the time. By prevailing ideals there may be understood the ideals held by the people who compose the particular nation, or that ideal or ideals held by other nations. The prevalence of an ideal depends upon race, climate, industrial activities, morals, trade, productions, commerce, transportation, knowledge, that is, upon not only the economic, the social relations which exist between and among the people of the nation, but also between and among nations also. Thus government becomes greater than a mere national problem, it becomes a world problem.

In a nation there are two civil elements: the individual and the

state; the particular and the general; the part and the whole. Considered as a domestic, a constitutional question, there is no insurmountable difficulty in prescribing limitations of individual activity. The defense is ever the same,—the welfare of the state and of the individual. If the state is conserved, the individual is conserved. The essential difficulty therefore is to conceive aright the function of the state. This always means a conflict of ideals, ethical, ethnical, industrial, political, religious, educational, call the aspects what we may. Or, to use a current word of no small meaning, it is a question of *kultur*. What *kultur*? The state of mind at the time prevailing: it may be pagan or Christian; pacific or warlike; monocratic or democratic; industrial or static,—indeed as various as have been *kulturs* in the past, or at the present.

Is there no common measure, no common regulator of *kultur?* The Swiss *Association pour la Sauvegarde du Droit des Gens* would have us believe that such a regulator is "the opinion of the civilized world" (*cette opinion du monde civilisé*). But suppose that a powerful nation sets up an ideal of *kultur* which other nations reject! By the doctrine of *pares inter pares* that nation's ideal is a part of its sovereignty; by that doctrine, there may be as many *kulturs* as there are nations and as to *kulturs, pares inter pares.* If one of these nations, exercising its sovereign rights, as it understands them, for the purpose (as it understands its own purposes) of self-defense, that is, in order to maintain its own existence, wages war in order to compel compliance, by other nations, with that *kultur,* and actually compels such compliance, and in the course of its activities to that end establishes war zones, what if any violation of law (to use a phrase employed by the Swiss Association) has it committed?

If in this activity this nation is joined by other nations, animated by the same idea of *kultur,* and these allied nations succeed in compelling compliance in other nations, has not this joint action established, to the extent of its success, an empire of *kultur,* together with all that is thereby implied? And what limit is there to such activity? What limit is there to any method employed or likely to be employed by that nation and its allies in extending the empire of its *kultur*?

The question of establishing war zones is only one of the questions more or less new arising in the course of international affairs. Can a nation defend itself with noxious gases? With air ships? With floating mines? With artillery making havoc at thirty miles? With

armored ships? With submarines? With weapons of any kind? With ideas? With inventions commonly called utilitarian?

If by sovereign right a nation resorts to ultimate methods of defense, whether the product of the university laboratory or of the savagery of men in deadly personal conflict, and all this be in harmony with its *kultur,* who shall deny the claim of right?

Of course the answer is from those who, equally claiming sovereign rights, deny the *kultur.* By the doctrine of *pares inter pares* one nation has as much right to deny as another nation has to affirm the claims of a particular *kultur.* But if the combination of nations which supports one *kultur* surpasses in might the combination of nations which supports another *kultur* and the lesser in might yields to the greater, then public opinion is said to sustain the victorious *kultur.* So the "opinion of the civilized wordd" is the opinion of triumphant nations supporting a common ideal.

The practical problem then is one of combining the nations. Whatsoever opinion shall dominate the world must be supported by the dominant might of the world.

Almost innumerable are the suggestions, the plans, the devices put forth from age to age, one may say, from moment to moment, in the hope, not to say confidence, of answering the question, How shall the world be governed? A familiar presentation is of the drain of armaments in time of peace, implying of course a heavier drain in time of war. Thus at the time of the outbreak of the present European War, the world's annual armament bill was said to be quite two and one-half billion dollars. This did not include the amount of capitalization for military purposes, that is, for the immediate manufacture of munitions and supplies for war, not merely weapons as commonly understood, but supplies such as foods, clothing, medicines, military and naval education, and the economic cost of the deflection of human energy from peaceful to warlike activities. Unfortunately there is no estimate, possibly none can be made, of the world's annual peace bill; of the valuation in dollars of all activities which are not distinctively for war. There is reason to believe that the valuation of peaceful activities the world over far exceeds the valuation of war activities. War is commonly spoken of as the exception rather than the rule in the modern world. Peace may be said to be the recovery from war. But human life is commonly estimated by health rather than by sickness.

Suppose that the *kultur* of a nation is an embodiment of the belief

that a state of war expresses a higher civilization than a state of peace. In the United States the civil is above the military authority: thus this allocation of possible activities gives character to the American idea of *kultur*. But there are powerful nations whose *kultur* is of the supremacy of the military over the civil authority.

The world has been told that an industrial people ever desire peace, but the spectacle is now presented to the world of a people famed for industrial efficiency who desire war. With spindles and looms, and engines, and furnaces, and factories of all sorts and kinds, we have been told there ever goes peace, prosperity, sanity, comfort, civilization, and that "the killing of workers and the destruction of property are a hideous waste of human effort. War has done more than anything else to retard the progress of mankind." Over against this accusation against war there is made an accusation against "the killing of workers" by the hideous waste of human lives in factories, and not merely of men and women but of children and of children yet unborn. We are told that war destroys life and property; we are also told that in the industrial world lives are destroyed and property is held by the few whose lives are not risked. Yet, strange to say, armies are composed of men who, if not under arms as professional soldiers, must be workers in various industrial activities.

Again we are told, by a learned French professor, that the demand of Germany for a market for her wares is the real cause of the present European War; that German notions of industry are German notions of world policy. We are told that so sharp is competition today, Germany wages war to gain a commercial place in the sun. We are told again that the fearfulness of the present war is commensurate with the industrial efficiency, the *kultur* of the belligerents. We are told that the German university, the German laboratory, German science, German education, the wonderful German mind is fighting this war.

If we turn to Thucydides or Livy, to Polybius or to Tacitus, we do not find economic explanations of war. If we turn to the Wars of the Roses, or to the Napoleonic Wars, or even to such a recent war as that of the American Revolution or the War with Mexico of 1846–48, the explanation is not economic. Usually, the explanations of war are, or attempt to be explanations of political or religious differences, possibly racial differences, but it is reserved to the present European War to find expounders and exposition in economics and industry. If Germany had been a strictly agricultural state there would have been

no war by Germany. Had the globe offered unexplored regions suited to colonization, such as America offered three hundred years ago, there would not have occurred the present European War. But the world is practically all taken up by first comers. England was largely in possession when Germany arrived. A war ensued, and we are gravely told, necessarily ensued among the Powers over the world market. Germany demanded the share she claimed in that market. Her *kultur* identifies her existence with the possession of what she considers her share in that market. Her *kultur* makes the military superior to the civil authority. Her *kultur* identifies her laboratories, her schools, her universities, her wonderful mind with not only her local existence on the continent of Europe, but with her continued existence as a nation.

Now within a nation, were an individual or a subject to make a similar *kulture* the practice of his life, the state would promptly impose limitations upon him, for the good of the state, and (at least by assertion and legislation) for his own good. Such imposition of limitation is common experience in nations. Even though that individual citizen or subject may possess the highest efficiency, though he may be able to coördinate other individuals or subjects with him and so increase his efficiency, the nation, the state, nevertheless limits him, even if by compelling him to take in the state as partner. In process of exercising this power of limitation, the state may imprison him and confiscate his property; it may even put him to death. In other words, in its function or office of realizing its *kultur* the state or nation resorts to confiscation and the death penalty. The public opinion of (within) the state sustains the state in this procedure.

Now public opinion is not easily defined, but it may be loosely defined as the will of the sovereign. That sovereign may be the will of a majority of citizens or subjects or the will of the absolute monarch. It is not a constant; it varies from time to time. But the will of the state is the supreme law of the state.

Is the opinion of the civilized world relative to the world comparable to the opinion of the individual state? Is it possible to formulate that world opinion and to make it the basis of the limitation of nations as public opinion within the individual state prescribes the limitation imposed by that state upon its citizens or subjects?

This appears to be the real question now at issue: the fundamental question when we ask, "Should the right to establish war zones on

the high seas be recognized and what, if any, should be the provisions of international law on this subject?"

International law is not law in a domestic, constitutional or statutory sense; it is a rule, or collection of rules, agreed upon by civilized states in their mutual dealings. It is an expression of interstate, or international opinion. It is a more general rule than a national constitution, much as a national constitution is a more general rule than a statute. Strictly speaking, if world opinion suffers the establishing of war zones, then war zones are internationally lawful. In international law, as in constitutional or statutory law, a distinction is made between things lawful and things moral. As in our relations as citizen to citizen, a matter may be strictly lawful yet be essentially immoral, or even unmoral. Perhaps the relation between morals and law may be intimated when it is said that discarded legislation has been discarded largely because it proved by experience to be immoral. Or, stated in another form, the legislation of the states of the world tends ever to approach morality. No conclusions are more familiar than the declarations of the Hague Tribunal concerning expanding bullets, asphyxiating gases, projectiles and explosives from balloons and aerial craft, the treatment of civilians by armies, and submarine mines. All these conclusions, it is trite to remark, are deducible from generally accepted moral ideas. Yet, during the present European War, agreements signed by Powers now belligerents have been ignored. And why ignored? Because of the lack of a sanction or vindicatory power to enforce them. Will world opinion, public opinion, enforce them? It has not enforced them, whence the conclusion that there is no such public opinion.

As the most sacred duty of the state is to do all within its power to remain the state, so will it ignore international agreements, even entered into by itself, if its existence is threatened by adherence to its agreement, that is, if in its opinion that existence is threatened. But what if in seeking to maintain that existence it resorts to practices condemned by world opinion? Will it not flout world opinion in order to defend itself? Suppose that world opinion is sanctioned by such a world organization of nations that the practice of a forbidden procedure brings the offender at the bar of the world organization, an organization able to enforce its rules?

If this world organization or union of various like-minded nations forbids the establishing of war zones, and this organization is mate-

rially able to enforce its rules, no war zones will be established. If the enemy with which a nation is at war is able to prevent that nation from establishing a war zone, none will be established. At present England and France and their allies are not able to prevent Germany's establishing such a war zone.

If the question were strictly a national question, not an international one, the state itself would determine it, that is, Great Britain or France would quickly determine what if any limitation shall be imposed upon its citizens or subjects. For example, France saw fit, for the general welfare, to impose limitations as to the manufacture, sale and use of absinthe. Could the whole world, or the actually dominating Powers of the earth agree upon a procedure, as, for example, the eradication of piracy, then that procedure would be international and piracy would be eliminated from the earth.

But in arriving at international agreements, trade, commerce, safety in travel and transportation, rights of conscience, and the like thus far are the chief theme. International law has never trespassed upon the essential and fundamental right of a nation to self-defense, or, if it has trespassed, it has never actually combatted the right. Nations have so combatted, but international law has never recognized the right of international trespass. This is as much as to say that international law, rude as it has been, rude as it is today, feeble as it has proved to be repeatedly, has ever recognized the doctrine of national sovereignty. I say, "ever"; more carefully speaking, I must say, that it has so recognized the doctrine since the days of Grotius and his theory of *pares inter pares.*

Suppose that world opinion chooses to formulate a peace pact to prevent war. Is an alliance for peace any more foreign to human welfare than an alliance for war? If we presume to measure nations by their armaments may we not also measure them by their peace assets? If more capital, if a greater portion of the labor of a country is engaged in working for peace rather than for war, might not a peace alliance actually out-capitalize a war alliance, and thus on the low plane of mere material strength form a working basis for the peace of the whole world?

But alliances presuppose acceptance of a common ideal; a common *kultur.* It is impossible for strangers to agree; as soon as they agree they have ceased being strangers. It is impossible for nations to agree until they have individually accepted the same *kultur.* Is there a

peace *kultur* as well as a war *kultur?* Does the formation of a peace pact among nations mean essentially the formation of a war pact? Very likely. But the formation of a peace pact is a formulation of an opinion; and if formed by the nations of the world, or by those who dominate it, that pact becomes a sanction for peace, and as yet no such sanction has existed as a world power or world opinion.

If this world power agrees to the establishing of war zones by a nation, then war zones will be established. If it forbids them, then they will be forbidden, and to the extent of the validity of the peace pact they will not exist.

There are interests which contribute to such a peace pact. First there are all those interests usually called material interests, the interests which eventuate (to use a familiar Gallic word) in sufficient food, clothes, shelter for mankind; secondly, those interests which affect the thinking of men, for as men think so are they, and a state of peace is the only state which enables men to think freely; thirdly, those interests which affect all and every human activity. It is a plain, an humble statement to make, but when we analyze that composite we call man, we find him functioned to three things, to eat, to labor and to think. The supreme, the only excusable right of a peace pact or of a war pact is to enable man to be himself. And he is best himself when he is under the best limitations. The nation, the state, limits him for its own ends; the world, the international, limits him for its ends. Of course this conclusion, however lame or impotent, brings us to morality, to ethics, to all the difficulties in politics which have first disclosed themselves in philosophy. But the problem remains; it is part of the totality of human life. And there is quite as much reason for giving a world solution to world problems as a national solution to national problems, or an individual solution to individual problems.

If we may presume to anticipate conclusions likely to formulate themselves after the present European War is over, the nations will not abandon what gains may have been made at any time toward the securing and the maintaining of a world peace. He who breaks the moral law does not thereby destroy the moral law or the need of it. If the establishing of war zones furthers the general welfare of the whole world, then henceforth the establishing of such zones will be the lawful procedure for all nations. The belligerent of today is the neutral of tomorrow, but law is for all time. The trend of life the

world around is toward a more common, a more general recognition of morals and, consequently, a more common and more general recognition of those rules which we call international law. In this world it seems that he who suffers must make the first outcry. If nations that suffer because of the present war zone make no outcry, then silence may be construed as consent. It is because a war zone does or does not promote the general welfare that it must be permitted or forbidden by international law.

And this must be the answer to the question, "Should the right to establish war zones on the high seas be recognized and what, if any, should be the provisions of international law on this subject?"

If war zones promote the general welfare, the right to establish them on the high seas is unquestionable, and international law, on this subject, must not only permit them but enforce and protect them. The essential question here is a question of the general welfare. To promote that welfare is the supreme care of constitutional law; it is also the supreme object of that body of rules called international law.

From these considerations it follows, that, accepting the present fundamental of international law, *pares inter pares,* and the fundamental of national law, the *general welfare,* the question of the right to establish war zones on the high seas must be examined from many angles and points of approach.

The industrial, the political, the legal, the moral, as the interests (vast as they are) affect nationals, whether as belligerents or as neutrals. The question of common right of the whole world to the use of the high seas, questions of blockade, immediate and ultimate destination of commerce, right of a nation to self-defense, right of a nation or an alliance of nations to exploit a form of *kultur;* right of a nation or an alliance of nations to protest, or even to fight against the imposition of any form of *kultur* by other nations or any of them; right of the whole world to eat, to think, to labor without injury to other eaters, thinkers and laborers; the right of a powerful nation to exploit any market at the expense of another nation; the right of any nation to make the military superior to the civil authority or the civil superior to the military authority; the right of any nation, or group of nations, even inclusive of the majority of the Powers of the whole world to impose limitations not only upon the individual or the subject but upon any nation; and finally, the right of world opinion "to bridge the great gulf opening between the peoples of the world (*un abîme se creuse entre les peuples*)," the right of the civilized world to enforce

"the interests of Truth, the triumph of law (*travailler pour la vérité, et par là même pour le triomphe du droit—pro luce et jure,—combattre l'erreur, source de divisions et de haine entre les peuples, et contribuer ainsi au rapprochement des esprits*)," all this is latent in the question we are here attempting to consider.

The supreme difficulty is not in discovering the wrong to be remedied, but the remedy to correct and to prevent the wrong. When world opinion makes international law more than a rule adopted by nations, civilized states, to regulate their mutual dealings, a mere rule and not a law possessing a sanction, then and not till then can the international evils from which the world suffers be brought before a court whose sentence shall not merely resemble but even surpass in validity the sentences of national courts of justice.

The sovereignty which must determine whether or not it is the right of a nation to establish a war zone must be a world sovereignty, an organized world opinion comprising a membership able and willing to execute its sentences. In other words, the right to establish a war zone must be a truly sovereign right.

The CHAIRMAN. I now call upon the next speaker, Professor Hershey.

Professor AMOS S. HERSHEY. I should perhaps apologize for a certain amount of repetition of what has already been said and so well said this afternoon; but a certain amount of repetition seems to be unavoidable, for I found that the discussion of the war zone problem seemed to involve a certain amount of discussion of the problem of the submarine.

SHOULD THE RIGHT TO ESTABLISH WAR ZONES ON THE HIGH SEAS BE RECOGNIZED AND WHAT, IF ANY, SHOULD BE THE PROVISIONS OF INTERNATIONAL LAW ON THE SUBJECT?

ADDRESS OF AMOS S. HERSHEY,
Professor of Political Science and International Law in the University of Indiana

I

The question of war zones seems first to have arisen during the Russo-Japanese War. On April 15, 1904, the head of our State De-

partment received the following surprising communication from Count Cassini, the Russian Ambassador to the United States:

> I am instructed by my Government, in order that there may be no misunderstanding, to inform your excellency that the lieutenant of his Imperial Majesty in the Far East [Admiral Alexieff] has just made the following declaration: In case neutral vessels, having on board correspondents who may communicate news to the enemy by means of improved apparatus not yet provided for by existing conventions, should be arrested off Kwan-tung, or within the zone of operations of the Russian fleet, such correspondents shall be regarded as spies, and the vessels provided with such apparatus shall be seized as lawful prizes.

Similar, if not identic, notes were communicated to the other Powers. Against this declaration by the Russian Government that it proposed to treat as spies any newspaper correspondents who might be engaged in the dissemination of news within a "zone of operations" on the high seas by means of wireless telegraphy, our Government uttered no formal protest, though the Russian Foreign Office was notified that "the United States does not waive any right it may have in international law should any American citizen be arrested or any American vessel be seized."

The Russian note to the Powers was provoked by the presence in the Yellow Sea and adjacent waters of a London *Times* correspondent who had chartered a Chinese dispatch boat called the *Haimun* and, equipped with wireless apparatus, was engaged in the transmission of war news in cipher to London *via* the British or neutral port of Wei-hai-wei.

It appears that the Japanese authorities also attempted to restrict the movements of the *Haimun* on the high seas and in neutral waters, though in much less drastic fashion than had been the case with Russia. During the Russo-Japanese War Japan is also said to have declared and notified a number of "defense sea-areas," some of them extending beyond the territorial waters.

The Russo-Japanese War also furnishes the first precedents for the use of submarine mines on the high seas, though there appears to have been no attempt to justify this practice on the theory of a war area or zone of military operations.

During the latter part of May, 1904, it was reported that the Rus-

sians had sown the whole strait of Pe-chi-li with floating mines. The New York *Times* for May 23, 1904, stated:

> Not only have these diabolical machines been placed off their own shores and in their own waters [Russian], but it is reported that launches and junks have been sent out to drop mines at night or in fogs in waters likely to be used by the Japanese warships and transports. These mines have drifted into the high seas and Chinese waters, where they constitute the gravest danger to neutral shipping.

The prediction by experts that these mines would constitute a menace to the lives and property of neutrals after the war was only too well fulfilled.

At the Hague Conference of 1907 the Chinese delegate made the following statement:

> The Chinese Government is even today obliged to furnish vessels engaged in coastal navigation with special apparatus to raise and destroy floating mines which are found, not only in the open sea, but even in its territorial waters. In spite of the precautions which have been taken, a very considerable number of coasting vessels, fishing boats, junks and sampans have been lost with all hands without the details of the disasters being known to the Western World. It is calculated that from five to six hundred of our countrymen engaged in their peaceful occupations have there met a cruel death in consequence of these dangerous engines of war.

The Russians seem to have defended their action (both in laying mines on the high seas and in threatening to treat journalists engaged in the transmission of wireless messages as spies) mainly on the ground that "everything is permissible in war except those things which are specifically forbidden by convention or international law."

An adequate reply to this argument would appear to be that in the case of any new or unauthorized interference with the rights of neutrals, and particularly on the high seas, the presumption should always be in favor of the rights of neutrals and noncombatants, and of humanity.

In order to render such acts as the declaration of a war zone and the laying of mines on the high seas lawful, they should be specifically authorized by custom or convention; for their *prima facie* illegality

may be deduced from general and fundamental principles. The sea is the common property and highway of all nations. In times of peace there is almost absolute freedom of the seas, and even during war its trade routes should be free and open to neutrals, subject to the belligerent rights of visit and search, blockade, and so forth. Even enemy merchantmen are not without their rights as common carriers on the high seas, as in the case of noncombatants in land warfare.

During the present war the submarine has been added as a new terror to the horrors of modern warfare. Like automatic contact mines, these new weapons are employed without warrant or authority on the high seas, and are used as commerce destroyers, being applied almost indiscriminately to neutral and belligerent vessels alike by the Central Powers.

The war had hardly begun before the Germans were accused by the British of laying unanchored as well as anchored mines without warning in the North Sea and on the trade route between Liverpool and America off the northwestern coast of Ireland.

On November 3, 1914, Great Britain declared that, "owing to the discovery of mines in the North Sea, the whole of that sea might be considered a military area." All vessels were warned and advised to follow one of two alternative routes indicated by the British Admiralty.

On February 4, 1915, Germany declared "all waters around Great Britain, including the whole of the English Channel" as included within the zone of war. She threatened to destroy "all enemy merchant vessels encountered in these waters regardless of all danger to their crews and passengers," and warned neutral vessels that they were also exposed to a similar danger.

It is unnecessary to rehearse here and now the damage wrought during this war by German mines and submarines. And their activity has by no means been restricted to declared war zones. The main facts are so indelibly impressed upon the minds of all of us that we could not forget them if we would. Suffice it to say that, according to a statement made recently in the House of Commons by Mr. Runcieman, the President of the Board of Trade, since the outbreak of the war 3,117 noncombatants have lost their lives in maritime disasters due to enemy mines or to submarines.

Now what is the remedy for this state of affairs? What measures should be taken, what rules and regulations adopted at the close of this war which will afford some prospect of relief from such condi-

tions or prevent a recurrence of such acts of frightfulness as we have been witnessing both in land and naval warfare? Mines and submarines doubtless have their legitimate use in modern warfare, but such use should be mainly or substantially for defensive purposes and should be mainly confined to belligerent or territorial waters. Owing to the long range of modern guns, their employment for defensive purposes should be permitted to some distance beyond the three-mile limit; and, since certain military operations on the high seas are unavoidable, a limited use of mines and submarines for purely military purposes on the high seas must perhaps be conceded by way of exception.

Experience during the Russo-Japanese and Great European Wars has, however, amply demonstrated that such military use of mines and submarines must be carefully restricted and their use as commerce destroyers be altogether prohibited.

The arguments against the use of the submarine as a commerce destroyer are well summarized in a communication which bears the signature of Mr. Bryan to our Ambassador in Berlin, dated May 13, 1915:

> The Government of the United States, therefore, desires to call the attention of the Imperial German Government with the utmost earnestness to the fact that the objection to their present method of attack against the trade of their enemies lies in the practical impossibility of employing submarines in the destruction of commerce without disregarding those rules of fairness, reason, justice, and humanity which all modern opinion regards as imperative. It is practically impossible for the officers of a submarine to visit a merchantman at sea and examine her papers and cargo. It is practically impossible for them to make a prize of her; and, if they can not put a prize crew on board of her, they can not sink her without leaving her crew and all on board of her to the mercy of the sea in her small boats. These facts it is understood the Imperial German Government frankly admit. We are informed that in the instances of which we have spoken time enough for even that poor measure of safety was not given, and in at least two of the cases cited not so much as a warning was received. Manifestly submarines can not be used against merchantmen, as the last few weeks have shown, without an inevitable violation of many sacred principles of justice and humanity.

The declaration of war zones or areas of military operations within which neutral rights are seriously curtailed by mines and submarines

must also be interdicted or, if at all permitted, their geographical limits and belligerent activities therein must be narrowly circumscribed.

How may such rules and limitations be enforced? Our experience during this war has or should have convinced us that we can no longer put our trust in platonic Hague conventions, in neutralization scraps of paper, or even in good intentions embodied in arbitration treaties. There must be a hard and fast league of states, including as many of the great sea Powers as can be trusted or induced to join it, who shall incorporate a convention on this subject along with many others into their articles of agreement or alliance. Such articles of agreement may and should include agreements on many subjects beyond the scope of this paper, and beyond the scope of international law itself. It might, for example, include a guarantee of international arbitration in disputes of a juridical nature, of mediation and commissions of inquiry, etc., in case of political differences, of the rights of small nationalities, of policies such as the Monroe Doctrine, of the Open Door in China and elsewhere, and of the fundamental principles of international law. But among these matters of greater moment, it must find place for a convention on war zones and the use of mines and submarines. And this league or alliance must be ready and willing to order execution against any nation or government guilty of violating such rules, regulations, or articles of agreement.

The CHAIRMAN. The question entitled "Should the right to establish war zones on the high seas be recognized and what, if any, should be the provisions of international law on this subject?" is now open to such discussion as any of the members may care to make.

Professor PHILIP MARSHALL BROWN. Mr. Chairman, I hardly venture to attempt to deal with the subject that Mr. Hershey has treated so definitely and concisely, but it has suggested to me a very vital thought that has been going through my mind during these discussions; that we are appealing to a definite law of neutrality to safeguard neutral rights. It seems to me that the very subject under discussion tonight, the question of war zones, should indicate to us that there are subjects not treated definitely by any law of neutrality, and that in every war there will be unexpected developments, as belligerents in taking effective measures against each other are bound at times of necessity, as a part of the strategy of war,

to utilize new methods of warfare and new devices; and as war becomes increasingly scientific, efficient and comprehensive, new features of war will necessarily be developed. So it seems to me it would be fundamentally an error for any of us who are concerned with the welfare of international law to dare to state that in any war there may not be these developments. It seems to me we want to go much further than that, and to remember that a great war is a great conflagration. The neutral who is concerned about his own selfish interests can not plead those interests as absolutely superior to any other interests. Not only that, he must be prepared to recognize that in the efforts of other members of the family of nations to suppress a great conflagration it will be necessary for them to affect his interests as a neutral directly. I personally have reached the point where I can not with any patience approve of the idea that neutrals are in a privileged position; that when the rest of the family of nations are in the throes of a ghastly struggle, a neutral can plead his selfish individual rights as against the interests of the belligerents who are struggling, through this ghastly form of litigation, to put an end to their difficulties. I recall at this moment some tourists whom I met at The Hague in 1914. Their remarks were to this effect: "Isn't it annoying beyond measure that this war should have arisen? We had our plans all made for going into Russia, and we had such a wonderful trip planned. It seems to me that this horrible war has no justification at all to interfere with the rest of mankind and with the interests of the world!"

Now, really, it seems to me that that is not an unfair parallel. Are not neutrals taking about that position when they claim, in many such respects, certain rights as against the rights of belligerents? I myself can not recognize any great body of law governing neutrality. We have used these expressions a good deal during this discussion—an appeal to the law of neutrals. If those of us who are particularly interested in this subject will stop a moment and ask definitely what body of laws neutrality has to appeal to, I think we will find it extremely difficult to answer.

Prior to 1793, if you will consider the French ordinances, for example, you find there a mass of inconsistencies in regard to usage and practice. Washington endeavored to crystallize something definite in neutrality; but certainly the nineteenth century saw the most extraordinary application of neutrality in the different wars of that century. We ourselves in the Civil War developed an exceptional practice in

regard to neutral rights, notably in the *Springbok* case and others which has been adapted and extended in the present war. The Declaration of London is of no value in this war. It has been cast aside by the different belligerents, and even the United States has said it is not bound by it.

So it seems to me we want to be on our guard, in discussing this question of neutral rights, against the idea that we have a definite body of rules to which we can appeal. It seems to me that the neutral must recognize that the supreme law in neutrality is the law of the belligerent, and that neutrals will have just such rights as may be conceded to them by the exigencies of the situation, by the demands of humanity, and by the consideration which belligerents must show to neutrals in order to avoid participation in the war. In other words, the neutral nation ought to be satisfied that it is out of the struggle. If it finds any satisfaction in that negative attitude, I confess I do not find much to approve in it. We are reaching the point in international affairs where we are bound mutually to recognize our obligations to one another, and if there is an international disturbance, if the nations of the earth are endeavoring to restore order and peace, if a neutral finds that it is unable to participate in that beneficent work of restoring order, it seems to me it should be satisfied at least in that it is not drawn into the actual disasters and into the sufferings of war.

Speaking extempore in this way perhaps I have used expressions which are not scientific or exact, but they are expressions that have been evoked since we have had discussion, particularly by the papers tonight. The question of war zones alone indicates the fact that neutrality in itself has yet to be clearly defined; and our interest, it seems to me, as a neutral, is not so much in defining the rights of neutrals as in trying to find some means of protecting the rights of the whole family of nations in times of peace, and not in times of war.

President HARRY PRATT JUDSON. Mr. Chairman, the speaker who has just taken his seat has laid down a rather dangerous proposition. It seems, if I understand it, that neutrals have no rights whatever, that belligerents give the law to the world, and that the long struggle for the right of neutrals is wasted; that each belligerent nation has a right to do what it pleases in its treatment of the others; in other words, that in time of war there is no international law, and that every belligerent is free to treat the world as it will; that if we see fit to join the war,

well and good, then we too share in putting on the world our own will, but as long as we do not see fit to join the war, that we have no rights; we can simply be happy in the fact that we are not fighting, and let each belligerent do with us what its own sweet will dictates. I believe this is wrong, and that there are rights which neutrals have in time of war if they do not see fit to join in the war, and that those rights are marked out by rather definite principles. There are not very many principles, but they are settled, and we ought to stand by them.

I believe these war zones are preposterous intrusions on the right of neutrals. That is to say, they are simply an attempt to enforce on the high seas rights that do not exist. A belligerent may do in his war zone anything that by law he may do on the high seas, but he has no right to do in that war zone anything that by law he has not the right to do anywhere else on the high seas.

It is not always easy to define technical rights. More than a century ago we had trouble to define our rights on the high seas, and finally we had to protect them by becoming belligerents ourselves. We may have to do the same thing in this case. Nevertheless, during that long struggle between France and Great Britain our Government insisted that certain things done by belligerents were contrary to law, and in 1856 our principles were adopted by the concert of nations and became law; they are law today, they recognize neutral rights to a certain extent, and those rights we have. In other words, it seems to me that neutrals ought to use what power they can to maintain every last right they have extorted by long and serious and difficult means from belligerents. That is the history of international law. It is not easy to get those rights, and it is not easy to maintain them, but if you abandon them, you abandon all international law; and international rights in time of peace become futile, because war can come at any time and destroy them. And that is something I do not believe.

Mr. FREDERIC R. COUDERT. Mr. Chairman, I confess I was very much interested in the apparently novel and, as it seems to me, very sound and interesting remarks of my friend, Professor Brown. He did seem to me to deal actually with reality. He seemed to have his hand upon realism, and not to be dominated by mere vague theories and the mists of philosophy. I take it that we are in danger of becoming somewhat confused because we deal with words rather than

things, and because we do not always think in terms of actualities. I take it that the present situation is so extraordinarily anomalous, so exceptional, that to apply to it the ordinary canons of everyday law and everyday history will lead us into positions that are absurd; and when we reach positions that are absurd and counter to morality and common decency, evidently we have been following wrong theories. It seems to me it is the old discussion that we have been having in this country for the last ten or fifteen years between legalism and real right and honesty and decency, and that it goes down very deep indeed. Some time ago I had an illustration of this question. All wrong is an infraction of law. Of course it is. I had an excellent Scotch nurse who happened to take my baby to the park in his perambulator. They went into some forbidden sanctum on the grass, and the policeman promptly reprimanded the nurse and threatened her with arrest. She was duly and properly indignant and angry to think that infants should be excluded from anything that was good and healthy and green and nice, and when she returned she explained to me the serious situation in which she had found herself, and asked me to make a complaint against the policeman. I had to explain to her in a lengthy discourse that after all she was an outlaw, that she had violated the law, that she was in exactly the same position as a common murderer, and of course entitled to no protection whatever from me. Of course she had violated the law, and she was outside the law, but my logic quite failed to convince her. So indeed we consider violations of international law as a kind of general intellectual concept, without thinking what they are. Do they deal with extensions of theoretical doctrines of "ultimate destination," or do they in the concrete consist in the slaughter of babies on the high seas? Perhaps, theoretically, the neutral is equally interested in maintaining them all, but of course the common man in the street who is endowed with a good deal of common sense, which has not been obfuscated by reading too many books, can see that there is an essential difference. The ordinary man knows that there is a tremendous difference between a technical infraction of law, like the catching of a fish the day before the season opens, and hideous things, like the murder of women and children, that go to the very basis of human society. The question is not as to the possible particular violation of international rights in a particular case, over which judges may differ and lawyers may split the Supreme Court, but whether there is

to be any international law at all or not. The interest of the neutral, as Professor Brown has so felicitously put it, is in maintaining a position which is consistent with the existence of international law for the future; not in slapping first at the nurse with the perambulator and then pouring equally burning words of imprecation upon an unutterable murderer, because that does not get the neutral anywhere except to make him more or less discreditable, however much he may becloud the issue in rhetoric. The question is whether there is any international law, or whether the fundaments of it have been destroyed; whether the whole great underlying system of international law, usage and convention has been violated. In a world which has become anomalous, and in which only one great neutral remains, it seems to me that neutral has a simple and straightforward duty, not merely to protest equally against every violation of international law, not to treat the occasional rifling of a mail bag as it might the destruction of a great neutral nation like Belgium, but to stand resolutely on some fundamental proposition and to say that in a whole world that has gone to war there must somewhere or other be right, and wherever that right is found, that right we must sustain. We can not say that that right is not a one hundred per cent right. It may be only ninety-nine or ninety-eight or ninety-three per cent right, but that there is a basic, dominant, fundamental right somewhere, and where that dominant right lies, there international law and international morality and decency lie; and the neutral must align itself with that and stand up for it manfully; not merely whine piteously, whether its pocket is pinched, or its handkerchief abstracted, or whether its citizens are killed. There comes a time when to a great nation continued neutrality means abandonment not only of rights but also of duty. The whole situation is anomalous, and extraordinary, and the attempt to apply mere book rules, apart from the situation, and without a realization of it, is merely abstract reasoning purely in *vacuuo*.

The CHAIRMAN. After this expression of opinion by Mr. Coudert, which certainly is not to be found in the books, does any one care to continue the discussion further, to ascertain where this non-existent right lies?

Mr. EDWARD C. ELIOT. Mr. Chairman, it seems to me that Mr. Judson is right. For several hundred years there has been

a steady development of principles, which we call principles of international law. Those principles have received the approval in the main of civilized countries up to this time. It is true that they are not certain in all respects, and that there are ambiguities in connection with the subject, which we would like to resolve; but, nevertheless, there is a body of law which is entitled to the designation of international law, and which had, up to the beginning of this war, been generally received by civilized nations as binding upon them.

Now that being the case, it strikes me that it is preëminently the duty of all neutral countries, which stand at the side of this great contest, to examine with care the situations which seem to involve breaches of those principles, and to make their opinions perfectly clear upon such matters. The subject for this evening presents a question which, it strikes me at once, is naturally and easily answered. Up to this time the seas have been open. Since the great discussion upon that subject in the time of the Stuarts, the doctrine has been fully developed and stands recognized that outside of territorial waters the open seas are free to the vessels of all nations, and that the citizens of all countries have rights there, the rights of peaceful citizens. Where they are within those rights they ought to be protected.

The question before the Society this evening, that of war zones, is answered at once by the proposition that the seas are open. There is no right on the part of belligerents—at all events none has been recognized of late years—to close any portion of the waters of the ocean or to exclude neutrals therefrom. The answer, therefore, to the question that is put to us tonight I think ought to be "No." The general and philosophical discussions of the subject along the lines last suggested by gentlemen here are really out of the case. We have a definite law of the seas that has been recognized, and we ought to stand by it and do what we can to maintain it.

The CHAIRMAN. Is there any further discussion? There are many here tonight who have views on this question. It would be invidious to single out any, and in order to prevent that, Mr. Andrews rises.

Professor ARTHUR I. ANDREWS. I may make a remark as radical as any that has been presented here.

The CHAIRMAN. I doubt it.

Professor ANDREWS. I teach my classes that there is a good deal of common sense in international law, and I am going to appeal not only to precedents and to abstract justice and equity, but I am going to appeal to common sense. I do not quite understand the war zone perhaps in the way that it has been presented, but I certainly think the war zone has come, and is likely to stay and to be expanded. That does not mean that it is necessary for the war zone to be as horrible a thing as some of us might think at first. I might almost say that the question of its existence has been settled, and that it has been accepted. It has been accepted for two or three years in some courts in this country. Quotations have been made, and I am going to quote from a recent discussion at one of our prominent institutions, a few years ago, which I think has a bearing on the case. I beg the pardon of those who are already familiar with it, but it seems to be pertinent here. After discussing the fact as to the war zone—referring to the extension of the Russo-Japanese War zone, these statements were made:

> The practice, nature of regulations, and drift of opinion seem to show that in time of war a belligerent is entitled to take measures for his protection which are not unreasonable.

That seems to me in the line of common sense.

> Certainly he is entitled to regulate the use of his territorial waters in such a fashion as shall be necessary for his well being. Similarly a belligerent may be obliged to assume in time of war, for his own protection, measurable control over the waters which in time of peace would be outside his jurisdiction. It is universally admitted—

This is another place which sounds rather like common sense—

> that if a neutral is carrying contraband to his opponent, a belligerent may take the vessel to a prize court for adjudication. For such an act the course of a vessel may be changed, and it may be subjected to long delay. Would it be unreasonable to contend that the course of a vessel might be changed to keep it out of a specified area because it might there obtain information which would be of vastly greater importance to the enemy than a cargo of contraband, however noxious that might be?

There are reasons which will naturally occur to any one of you, just as strong reasons why a vessel might be delayed. Now I should like to have us proceed somewhat on the analogy of the blockade. Earlier in the evening a suggestion was made along that line. We might start to regulate war zones first by saying that a war zone in order to be legal must be effective. It must be definite. That I think is about what the first speaker said. In the future a war zone should be allowable, provided the rights of neutrals should be respected. Personally I think we might proceed in the further discussion along the lines of the blockade, and perhaps we will get somewhere near agreeing on regulations which we would recommend for the war zone of the future.

Admiral COLBY M. CHESTER. I had no intention of coming here to take part in this discussion tonight, but the Chairman has asked me to say a few words, and I never lose an opportunity, if I have it, to say something for the Navy.

I agree with what Professor Brown has said, that there are a great many questions that will have to be answered in the future that we do not know anything about at the present time, and that international law has not been brought up to date by any means. For the last twenty-five years we have been trying to bring the laws up to date, to meet the modern conditions of warfare, but they have not been codified on account of the fact that different nations were affected in different ways, and they could not harmonize on an agreement as to what the present international law provisions should be.

We all hope that one result of the terrible catastrophe that has come to Europe will be to bring about a new condition of things, but we can not hamper ourselves by making decisions now that will prevent our reaping the advantages which modern conditions have given to us, decisions that we may want to reverse when we are interested participants.

As for the matter of territorial waters, I do not believe anybody in the world knows what will be the definition of territorial waters. We speak of the three-mile limit, but that has long gone by. At the present time the territorial waters over which a nation holds control by gunfire extend in many cases miles and miles beyond the three-mile limit, and in the future we shall have a territorial zone that will probably be something like twenty miles from the shore. Take the south coast of

Cuba, for instance. The Cuban Government exercises jurisdiction over an area covering sixty or seventy miles off the coast. The three-mile limit could not be regarded as a boundary for a war zone on that coast, and it can not be so taken in very many other places.

I should like to tell you a little story of a rather sad experience that I once had which may have a bearing on the armed ship question that you discussed here this afternoon. I want to say that I have been cruising around the world for fifty years, and I have never been on a foreign station in my life when war was not going on in some part of the station to which I was attached and many of these questions have been handled by officers of the navy in a practical way a great many times.

Just before the late Spanish War it was my misfortune to be sent to the coast of Florida to protect the Island of Cuba against filibustering expeditions fitted out in Florida. We were not told what a filibusterer was, and I do not believe anybody can define a filibusterer now. I was sent to blockade the port of Jacksonville to keep two well-known filibusterers from coming out. They were two small tug boats, the *Dauntless* and the *Three Friends* which had been bonded to five times their value to make them keep the peace, but still they kept carrying arms to Cuba. Finding that arms were still going to Cuba, the President of the United States finally sent me another ship to help maintain the blockade and said that if I did not stop the filibustering he would take me out of my command. But a ship had a perfect right to go loaded with arms, from Jacksonville to any port in the world. She could take five thousand stand of arms and five thousand men and uniforms for them, but unless we could find the ship at a time when she was engaged in landing arms, or with men with arms in their hands we could not declare that she was a filibusterer. She had a perfect right to carry on legitimate trade, just as we have now, and to maintain her rights.

The filibusterer was a very wily member of society, and when we chased her out to sea she would run for the Bahama banks and anchor in three or four fathoms of water, while the blockader would have to stay off in a hundred fathoms of water, until our coal gave out and we were forced to seek a port, when she would go and land arms on the Cuban coast. I was thus left in a delicate position. I did not want to be taken out of my command. Finally the *Three Friends* came out from Jacksonville one day and the captain said he wanted to go

out and tow in a vessel that was out in the offing. That was his business. He asked me to let him go. I said, "No. You go back into port." He said, "I have a perfect right to go." I did not doubt this, but said, "You go back into port." He started off a little way and then came back and said, "Will you give me a certificate that you have stopped me from carrying on my legitimate business on the sea?" I said, "No, I will not give you the scratch of a pen. When you get an order from the President of the United States authorizing you to come out, you can go anywhere you please, but until you get that order you can not leave the port." He went back into port. Now, under the law I was compelled not only to give him a certificate, but to register the fact on his manifest. Had I done so, however, he would have secured an injunction from the civil court at Jacksonville against my interference with his legitimate business, as was done later with another ship-of-war, and thus have broken up the blockade. I disobeyed the law in order to keep myself from punishment, and in that way we kept him in port. After my ship had been withdrawn from the blockade, this vessel got out and carried a load of arms down to Cuba.

When the *Three Friends* finally made her escape a correspondent of a New York paper wrote a story about her, illustrated with a picture showing the little tug boat, with a six-pounder gun mounted on her stern. In a two-page article he described the first battle fought between the Cuban patriots and the Spanish navy. Another illustration was a purported copy of a photograph showing a big Spanish frigate sinking by the stern, with men in the water drowning, although, as he said, it was on a dark night when you could not see your hand before you. The correspondent told how the vessel finally reached one of the Bahama Keys which he called "No Name Key," and where he said that the crew suffered great hardship owing to the cruel treatment the officers of the navy subjected them to. Here they became so weakened, that one day an alligator came up on the shore and ate two of the men alive. This pathetic story appealed to the public very much. The United States District Attorney for the Southern District of Florida had been trying to make out a case against this vessel for a good many months, and he thought that if he could subpoena the correspondent before a civil court and get him to testify that this little tug boat had a six-pounder gun mounted on her as shown by the photograph which had been published, the tug could be declared

an "armed vessel," and then we could seize and condemn her and end all our troubles. The District Attorney finally got him on the witness stand in the civil court and asked him what his profession was, to which he replied that he was a professional filibusterer. The District Attorney then asked him if the story was true that he had written for the newspaper, and he said that some of it was true and some of it was not. He then said, "Tell the court what was true and what was not." He said "No, I will not do that. That will incriminate myself." He could be examined no further.

After the witness had retired from the witness stand he turned to the judge and said, "Judge, I presume you read that story of mine." The judge said he had. He then said "Did you believe it?" "Well, I had to take some of it with a grain of salt." "Did you take in that yarn about an alligator coming up on the shore and eating two men alive?" "Oh, that was rather fishy." "Well," ended the correspondent, "nobody but a fool would believe such yarns, and yet I make my living by publishing those stories in the newspapers. The American people want them and the papers want me to write them."

The point is that if we could have established the fact that the *Three Friends* had a gun of any kind mounted on her, or if we could have caught the vessel with one man with a weapon in his hand, we could have carried her into court and condemned her as a filibusterer, and under the neutrality laws of the United States the vessel would have been condemned and sold, and the filibustering would have been stopped.

The CHAIRMAN. Is there a desire on the part of any member present to discuss further the question of the right to establish war zones on the high seas, with or without law?

Professor GEORGE G. WILSON. The subject of war zones has perhaps in part escaped our attention. There are various kinds of war zones. There were war zones established during the Russo-Japanese War, which were recognized as perfectly valid war measures, by all people in the world who were concerned. Those war zones were established as much for the benefit of neutrals as for the benefit of belligerents. There are certain areas where the belligerents are carrying on operations, and within those areas it is dangerous for neutrals or for private vessels of the belligerents to enter. It is entirely proper

that the belligerents should specify those areas in order that there may be no undue risk taken by the vessels going into them. In time of war we limit the actions of belligerents and neutrals. We do that by blockade, by seizing contraband, and by limiting the action of vessels that are supposed to be engaged entirely in unneutral service. We do not allow the radio to operate within certain areas, because there would be great risks to belligerents if the radio were operated within those areas.

Now there are certain perfectly legitimate things which may be done or may be forbidden in a given area. Therefore we may be talking about two very different things. There may be legitimate action within the war area, in the same way that there may be a legitimate blockade, and a blockade that is not legitimate. We say a blockade that is not legitimate is a blockade that is not effective. Japan established a war area, or a strategic area as it is sometimes called, in order that there might not be on the part of neutrals interference with the plans of the Japanese navy in certain specified neighborhoods, near fortifications and the like. There had been mines placed in some of those areas, and the placing of mines, if definitely described and specified, in an area from which neutrals are excluded, is an act which is regarded by the Hague Convention as entirely and perfectly legitimate. So it is necessary for us to consider practically the facts in these matters, and to realize that for the benefit of neutrals and belligerents alike there is reason for the establishment of certain strategic and war areas.

If I may be pardoned, like the others, for speaking upon a matter that is not directly under consideration, I would like to leave a little more optimistic tone in this discussion in regard to the disappearance of international law. As I think one of the speakers here was reading from something upon international law as related to war zones for which I shall have to assume responsibility. I should hate to have that considered as of no value at the present time. Nearly every one who has been concerned with international law in the last few months has probably been greeted by friends with condolences of various sorts as to his possible future, as to whether he was planning to undertake some new form of occupation, in view of the disappearance of international law. Professor Moore, who has some standing in international law, reported that his friends had been treating him to similar doleful remarks recently. Now international law has not disappeared, nor has its force entirely disappeared. The fact

is that practically every belligerent has been rushing into print, and has been deluging our mails with material, with printed matter of various sorts, endeavoring to show to us that it has particularly and faithfully followed the tenets of international law, or if it has not, that it will as soon as possible make good for the violation of international law. That printing was not undertaken purely as a philanthropic work. It was undertaken in order that the people of the world might recognize that these states have still some respect for that which we call international law.

The decisions of the French prize courts have followed international law very strictly. The decisions of the German prize courts, so far as I have been able to get hold of them, have likewise followed and recognized the principles of international law. The British have within a week announced that if orders issued by the King in Council were found by the court to be in contravention of international law, international law was to be followed; and if the courts of Great Britain are to follow international law, and the courts of France and the courts of Germany as well, and if all the belligerent states are appealing to international law as the justification for their acts, it certainly still has some standing in the world, and this Society will not yet need to disband. Further, when it comes to the final settlement, the problems of this great war must, if permanently adjusted, be adjusted under the principles of international law.

The CHAIRMAN. Is there a further desire to take part in the discussion?

Mr. CHARLES HENRY BUTLER. Before we adjourn I should like to make a formal motion. I may not be here tomorrow to make it.

I thoroughly agree with my friend, Professor Wilson, that international law is not dead. For that reason I shall ask the Society to continue the Committee on Codification, which has not been able to make a report at the present time; and, as the membership of the committee includes gentlemen who are absent engaged in discussing matters involving international law, we have not been able to have any meeting in order to codify the entire law; but we expect to do it, or at least to some extent. It will be a very long and difficult task, but we hope that step by step this committee can report to this Society from time to time; and while it may not be able to produce a complete code of

international law recognized by all nations, still if we can define from time to time some of its principles, it will be a great thing, and we will not only be of service to other nations, but be of some service to this nation and to the people who are interested in preserving this great branch of jurisprudence.

There is one thing in regard to this question of what international law is which applies in the same way to all other branches of jurisprudence, international, national and municipal. There is no fixity about it, in my opinion, any more than there is fixity in the application of the principles of municipal law or national law. Occasions will arise which are different from former occasions, and the question of the application of the same principle will constantly come up. There may have to be extensions of the principles or modifications of them. Take, for instance, the construction of the Constitution of the United States. When we speak of the law as established by the Supreme Court of the United States we regard it as nearly fixed as law can be, and yet on more than one occasion the Supreme Court has seen fit to reverse itself. In the case of the *Thomas Jefferson* (10 Wheat. 428), the Supreme Court decided that the admiralty jurisdiction of the United States did not extend to inland waters. Yet a few years afterwards, in the *Genesee Chief* (12 How. 443), the same court solemnly declared that it had made a mistake, and that the whole safety of the commerce of this country depended upon the Federal Government taking under its admiralty jurisdiction the control of the inland navigable waters. Now where would this country have been if the Supreme Court had not had the strength to say that it had erred in that respect? The Supreme Court had decided that the ebb and flow of the tide was what should control admiralty jurisdiction, but they saw where that led, and so they reversed their former decision. In the same way we may take a principle of international law as it may have been applied on a few occasions heretofore. A nation now struggling for existence sees that that principle can not be applied in the way that it has been heretofore. Are we, when we are at peace today, to say that there is a fixity in that principle which can never be changed? Are we to try to establish the principle that because a blockade zone has been limited in former wars to so many miles, it can not now be extended when a new instrument of warfare, whether it be a submarine or some electrical appliance, is invented, and that such new appliance can not be used because, forsooth, it was not used during our Civil War? Do we want to

tie ourselves up with a declaration of fixity which when the occasion arises may be quoted against us, so that they may say, "In 1916 you solemnly declared that the manner of application of these principles forever stood the same."

I am not prepared to discuss exactly how far a war zone should extend, but I do say that this country should be very careful how it establishes the principle that there can be no extension either of belligerent rights or of neutral rights which may be necessary to preserve our national life when the occasion arises.

Now, Mr. Chairman, I merely rose to ask, and I now ask, that the Committee on Codification may be allowed to report progress and be continued another year, and that it may report at the next meeting.

The CHAIRMAN. If there be no objection the report will be received and the committee will be continued. There seems to be no objection. The report is received and the committee is continued.

There being no further business before the meeting, it stands adjourned until tomorrow at 10 o'clock a.m. in this room.